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90-662

Supreme Court, U.S.
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NO. _____

IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1990

INSURANCE COMPANY OF NORTH AMERICA

Petitioner

vs.

M/V OCEAN LYNX, a/k/a M/V OCEAN LINK, her engines, tackle, furnishings, etc., in rem, MAR SHIPPING, INC., a foreign corporation, A. BOTTACCHI S.A. DE NAVEGACION,a foreign corporation,

Respondents.

PETITION FOR WRIT OF CERTIORI
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it is necessary for a carrier to provide a shipper of goods with a choice of freight rates and for the shipper of goods to voluntarily elect to ship at a lower rate in order for a carrier to enforce a provision in a bill of lading limiting its liability for damage to cargo.

2. Whether a shipper and consignee of cargo can be bound to terms and conditions contained in an illegible bill of lading.

PARTIES TO PROCEEDING BELOW

INSURANCE COMPANY OF NORTH AMERICA

EDUCATIONAL INNOVATIVE SYSTEMS, INC., (EDUSYSTEMS)

A. BOTTACCHI S.A. DE NAVEGACION

MAR SHIPPING LINE, INC.

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OFFICIAL REPORT CITATION

INSURANCE COMPANY OF NORTH AMERICA vs. M/V OCEAN LYNX, 901 F.2d. 934 (11th Cir. 1990)

JURISDICTION

(i.) The Judgment of the Eleventh Circuit was entered August 14, 1990.

(ii.) The Eleventh Circuit's Order Denying the Petition for Rehearing of the Defendant A. BOTTACCHI S.A. DE NAVEGACION was entered on June 20, 1990.

(iii.) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254, and Rule 12 of the Rules of the United States Supreme Court.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED

Carriage of Goods by Sea Act, 46 U.S.C. Section 1301 et seq. In particular, the petition concerns 1304(5) which states:

> **Amount of liability; valuation of cargo**
>
> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in

case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

JURISDICTION OF DISTRICT COURT

The United States District Court, Southern District of Florida had original jurisdiction pursuant to 28 U.S.C. Section 1333. This is an admiralty and maritime claim brought pursuant to Rule 9(h), Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

The Plaintiff's assured shipped a cargo of educational equipment in international trade. This shipment was carried on the deck of the M/V OCEAN LYNX and was lost at sea. Suit was filed against the charterer and operator of the vessel, A. BOTTACCHI S.A. DE NAVEGACION and the non-vessel operating common carrier (NVOCC) MAR SHIPPING LINE, each of whom issued bills of lading to the shipper covering the shipment and who asserted a right to limit their liability to $500.00 per package pursuant to the terms of the bills of

lading. The Eleventh Circuit found that the tariff of the ocean carrier who lost the shipment did not contain a choice of freight rates but the Court permitted the carrier to limit its liability on the basis that the Carriage of Goods by Sea Act provides for a limitation.

In addition, the Eleventh Circuit found that the NVOCC's bill of lading was illegible but permitted a limitation or liability on the basis that a freight forwarder employed by the shipper in Miami had prepared numerous bills of lading but was not in the habit of reading them.

ARGUMENT ON WRIT OF CERTIORI

I. THE ELEVENTH CIRCUIT HAS RULED THAT AN OCEAN CARRIER'S LIABILITY FOR CARGO DAMAGE MAY BE LIMITED UNDER THE CARRIAGE OF GOODS BY SEA ACT EVEN IF THE SHIPPER HAS NOT BEEN OFFERED A CHOICE OF FREIGHT RATES AND ELECTED TO SHIP AT A LOWER RATE IN EXCHANGE FOR LIMITED CARRIER LIABILITY. THE ELEVENTH CIRCUIT DECISION IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

Under Federal law, a carrier may limit its liability for damage to cargo only if the carrier offers a shipper a choice of freight rates and the shipper voluntarily elects to the ship its good at the lower rate in exchange for limited carrier liability. The two rates, which are common to rail, truck, air, and ocean shipments are known as the released rate (the lower rate) and the ad valorem rate (the higher rate). The leading case on limitations of carrier's liability is New York, New Haven & Hartford R.R. Company vs. Nothnagle, 347 U.S. 128, 73 S.Ct. 986, 97

L.Ed. 1500 (1953). In Nothnagle, this Court summarized this rule stating that "only by granting its customers a fair opportunity to choose between higher or lower liability by paying a correspondingly greater or lesser charge can a carrier lawfully limit recovery to an amount less than the actual loss sustained. Boston & Maine Railroad Company vs. Piper, 247 U.S. 438, 444, 445, 62 L.Ed. 820, 822, 823, 38 S.Ct. 354 (1918); Union Pacific Railroad Company vs. Burke, 255 U.S. 321-323, 65 L.Ed. 656, 659, 660, 41 S.Ct. 283 (1921)."

The Eleventh Circuit noted in its opinion that the carrier's tariff "does not provide a method through which a shipper of goods...can avoid COGSA's Section 4(5)'s limitation on liability."[1] Nevertheless, it permitted the

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[1] The ocean carrier's tariff did provide an ad valorem freight rate for "Currency, Specie, Gold or Silver Bullion, Precious

carrier to limit its liability.

The basic reason for the Federal common law rule that a limitation of liability cannot be imposed by the carrier absent a choice of freight rates is that a shipper should not be required to forego its right to recovery without compensation. A shipper which knowingly elects to ship its cargo at a lower freight rate in exchange for limited carrier liability cannot complain if its cargo is lost and its gets only a limited recovery for it. In this case, the shipper made no such election. It paid the highest freight rate chargeable by law.

The Eleventh Circuit's rational for permitting the carrier to limit its liability

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Metals N.O.S., and Negotiable Securities" but did not provide an ad valorem freight rate for general cargo such as shipped by the shipper in this case.

in the absence of the shipper's election to ship its cargo at a lower rate is the Court's assertion that once a bill of lading recites that the Carriage of Goods by Sea Act will be applicable to the shipment, the limitation of liability automatically applies because the Act itself provides for limited liability, thereby preempting, rather than supplementing the Federal common law on the subject of limitations of carrier's liability. No other Court has so found that the Act preempts the common law rule. The common law rules is that the shipper and carrier bargain for limited liability. Here, the shipper did not get the benefit of the bargain since it paid the highest freight rate and incurred the adverse effects of limited liability.

The practical effect is to emasculate the uniformity of maritime law. Under the Eleventh Circuit's decision, carriers would be

required to offer a choice of freight rates to limit their liability for the 75% of cargo shipments which are exempt from COGSA and would not be required to do so for the 25% to which COGSA applies.

The uniform approach to transportation of goods by common carrier is to apply the Federal common law doctrine of limitation of liability by estoppel to all forms of shipment including ocean carriage of cargo where COGSA is applicable, to ocean carriage of cargo in a non-COGSA context, to overland carriage of freight pursuant to the Interstate Commerce Act, and the carriage of air freight pursuant to the Warsaw Convention. There is no basis for carving out an exception for ocean carriage subject to the Carriage of Goods by Sea Act which does away with the Federal common law principle.

II. THE ELEVENTH CIRCUIT HAS DECIDED THAT A SHIPPER CAN BE BOUND BY A LIMITATION OF LIABILITY CLAUSE ILLEGIBLY PRINTED IN THE FINE PRINT ON THE REVERSE SIDE OF A BILL OF LADING. ITS DECISION IS IN CONFLICT WITH THE DECISIONS OF THE FOURTH AND NINTH CIRCUITS THAT REQUIRE THAT CLAUSES LIMITING AN OCEAN CARRIER'S LIABILITY BE LEGIBLY PRINTED ON THE FACE OF A BILL OF LADING.

The Eleventh Circuit found that "the MAR [SHIPPING LINE, INC.] bill of lading is illegible." The Court held that a shipper of goods, and presumably its insurer, consignee, bankers, and all others who rely upon the terms and conditions of bills of lading can be contractually bound by the terms of an illegible bill of lading. The decision is based upon the testimony of a freight forwarder, a type of travel agent who books shipments of cargo for numerous shippers with numerous carriers, who stated "that in preparing hundreds of bills of lading for EDUSYSTEMS he had never read the provisions on

the reverse side." However, there was no evidence of the fact that the freight forwarder had ever seen a legible copy of MAR'S bill of lading, or that the freight forwarder was an agent for the shipper, as opposed to being an agent for the carrier. The Court did note that some of MARS' bills of lading were printed clearly but it based that finding upon the fact that MAR SHIPPING LINE was able to attach a clear blank bill of lading to a Memorandum of Law in Opposition to the Plaintiff's Motion for Partial Summary Judgment, not upon a finding that MAR had ever used legible bills of lading in commerce. In short, there was no evidence that anyone other than MAR knew what its bill of lading said because no one testified that they had ever seen a legible bill of lading used by MAR.

The Eleventh Circuit's decision on this issue is commercially unreasonable. The

Fourth and Ninth Circuit Courts of Appeal have held that in order to prove "fair opportunity", notification of the $500.00 per package limitation contained in 46 U.S.C. Section 1304(5) must appear on the front of the bill of lading. This rule, which takes note of commercial realities was first enunciated by the Ninth Circuit in the case of Pan American World Airways, Inc. vs. California Stevedore & Ballast Company, 559 F.2d 1173 (9th Cir. 1977). In its analysis, the Ninth Circuit stated:

> We reject the appellant's argument that an experienced shipper should be deemed to have knowledge of an opportunity to secure an alternative freight rate, and higher carrier liability by reason of his knowledge of COGSA, 46 U.S.C. Section 1304(5), made applicable by a "paramount clause" in the bill of lading, where such opportunity does not present itself on the face of the bill of lading. The bill of lading is usually a boiler plate form drafted by the carrier, and presented for acceptance as a matter of routine business practice to a relatively

> low level shipping employee. We feel that imputing such knowledge of COGSA applicability and provisions to such an employee is an assumption that may go beyond the bounds of commercial realism.

Since the decision of the Ninth Circuit in Pan American, ocean carriers have stated that it places upon them too great a burden. This argument was rejected again by the Ninth Circuit in Komatsu, Ltd. vs. States Steamship Company, 674 F.2d. 806 (9th Cir. 1982). There the Court stated:

> [The Defendant] also complains that, unless incorporation by reference of COGSA is recognized as prima facia evidence, carriers will be forced to expressly reprint the language of Section 4(5) in full. [The Defendant] contends that this will complicate and lengthen shipping forms. This may be true, but we are not empowered to disregard our Circuit's precedent for the sake of the carrier's administrative convenience.

When the Fourth Circuit was asked to consider the same issue and balance the approaches taken by the Fifth and the Eleventh

Circuits with the position taken by the Ninth Circuit, the Fourth Circuit agreed that the limitation of liability language must be printed conspicuously and must be contained on the face of the bill of lading rather than in small print on its back. As the Fourth Circuit stated in Cincinnati Milacron, Ltd. vs. M/V American Legend, 784 F.2d. 1161 (4th Cir. 1986):

> The Courts have attempted to effect Congressional intent by interpreting Section 1304(5) to require carriers to afford shippers a fair opportunity to avoid the limitation of liability of that statute. To allow constructive notice is to emasculate the fair opportunity requirement. Like the Ninth Circuit, we are unwilling to impute the knowledge of limited liability under Section 1304(5) to a shipper's employee from a bill of lading which merely refers him to yet another lengthy document where the limitation is then revealed... language which explicitly brings the limitation of Section 1304(5) to the attention of the shipper must appear on the face of the bill of lading issued to the shipper. For similar reasons, we hold the tariff on file

with the Federal Maritime Commission is not prima facie evidence of fair opportunity.

The decisions of the Ninth and Fourth Circuits with regard to adequate opportunity to declare value have been followed by a number of District Courts and Circuits which have not formed rulings on this particular issue. In Royal Embassey vs. Ioannis Martinos, 1986 AMC 791 (E.D.N.C. 1984) the District Court found that an "express recitation" of COGSA Section 4(5) providing for a limitation of liability was necessary for the carrier to make a prima facie showing that the shipper had an opportunity to avoid the limitation. Since the bill of lading did not contain such an express recitation, the $500.00 per package limitation was found not to apply. A similar result was reached by the Northern District of Illinois in D.B. Trade International, Inc. vs. Astramar, 592 F.Supp.

1215 (N.D. Ill. 1984) where the Court stated:

> The Ninth Circuit's reasoning is more persuasive. Neither of the Fifth Circuit's decisions adequately addressed the key issue in determining whether or not the shipper had a "fair opportunity" to declare the actual value of its shipment...unless the bill of lading expressly states that the $500.00 limitation of liability applies, the shipper is aware only of the fact that COGSA applies, not that some limitation of liability lurks somewhere in the statute..."

In order to effect the overriding policy of uniformity in international commerce, it is important that this Court resolve the conflict between the Circuits. If the shipper in this case had chosen to ship its goods from a port on the West Coast of the United States or within the Fourth Circuit, its liability would not have been limited. Because it chose to ship its goods from Miami, its liability has been limited.

CONCLUSION

The decision of the Eleventh Circuit in this case may do little violence to the financial stability of these individual parties who are represented by large insurers not prone to receiving judicial sympathy. However, the decision creates an exception to what was a well-settled and remarkably non-litigious point of transportation law. When this Court decided in 1953 that Mrs. Nothnagle was entitled to recover from a railroad the full value of her lost luggage because the railroad did not give her a lower freight rate for its limited liability, it settled the issue for 35 years. The Court made no inquiry into whether or not Mrs. Nothnagle would have paid a higher rate because such subjective determinations are unnecessary. If the rate had been contained in the tariff, she would have been presumed to have notice; if it had

not been, she would not be so bound. EDUSYSTEMS is in substantially the same position as Mrs. Nothnagle. Edusystems received a bill of lading whose terms were illegible, Mrs. Nothnagle received no receipt for her luggage, Edusystems made no election to ship at a lower freight rate, nor did Mrs. Nothnagle. The result alone is inconsistent.

The uniformity of maritime law is again challenged by the notice required in each Circuit. Airline tickets, bus tickets, rail passes, and other transportation contracts all contain limitations on liability. Most limitations are printed in large type. Now the regions of the country are divided along the lines of type size and placement of the notice. The Eleventh Circuit is on the side of virtually no written notice while the Ninth and Fourth Circuits are for conspicuous notice. The non-uniformity of the law is

severe enough to warrant Supreme Court review to settle the issue, hopefully on the side of conspicuous notice.

Respectfully submitted,
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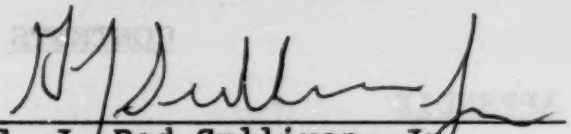
LAW OFFICES OF SULLIVAN & VLCEK



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APPENDIX

A-2 Opinion, dated May 18, 1990

B-2 Notice denying Petition for Rehearing, dated June 20, 1990

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

INSURANCE COMPANY OF NORTH AMERICA,

Plaintiff-Appellee-Cross Appellant,

v.

M/V OCEAN LYNX, a/k/a M/V OCEAN LINK, her engines, tackle, furnishings, etc., in rem, et al., Defendants,

Mar Shipping Line, Inc., a foreign corporation, Defendant-Appellee, Cross-Appellee,

A. Bottacchi S.A. De Navegacion, a foreign corporation, Defendant-Appellant, Cross-Appellee.

No. 89-5301

May 18, 1990.

Appeals from the United States District Court for the Souther District of Florida

Before JOHNSON, Circuit Judge, HILL* and HENLEY **, Senior Circuit Judges

JOHNSON, Circuit Judge:

This case arises on appeal from the district court's judgment limiting the

defendants' liability under the Carriage of Goods by Sea Act, 46 U.S.C.A. App. Sections 1300-15 ("COGSA"), and from the district court's order granting the defendant Mar Shipping Line, Inc. ("Mar") attorneys' fees and prejudgment interest on its cross-claim against the defendant A. Bottacchi, S.A. De Navegacion ("Bottacchi").

** Honorable J. Smith Henley, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

I. FACTS

A. *Background*

Educational Innovation Systems International, Inc. ("Edusystems") shipped 59 boxes of vocational and agricultural equipment to Asuncion, Paraguay on May 9, 1985. Through a freight forwarder in Miami, Meadows Wye and Company ("Meadows"), Edusystems entered into a

contract with Mar, which is a non-vessel-operating common carrier,[1] for transportation of the cargo from Miami to Paraguay. Mar, acting as Edusystems' agent,[2] entered into a carriage contract with Bottacchi for shipment of the cargo from Miami to Buenos Aires, Argentina.[3] Bottacchi loaded the cargo onto the M/V Ocean Lynx, a vessel chartered by

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[1] A non-vessel-operating common carrier is defined by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier." 46 C.F.R. Section 510.2(1)

[2] Edusystems may treat Mar as a common carrier for purposes of COGSA, but underlying carriers such a Bottacchi treat Mar as Edusystems' agent. *See Insurance Co. of N. Am. v. S/S Argosy*, 732 F.2d 299, 301 (2d Cir. 9184); 46 C.F.R. Section 510.2(k)

[3] Buenos Aires was the transshipment port from which the cargo would be sent to Paraguay.

Bottacchi and owned by Nabadi Maritime, S.A. On June 7, 1985, the Ocean Lynx encountered rough weather, and the container holding the cargo was lost at sea.

Both Mar and Bottacchi supplied bills of lading. The Mar bill of lading consists of one piece of paper. The front identifies the parties and contains a block where the shipping cost is calculated. The back contains twenty-seven clauses in extremely find print.[4] Clause one states that the carriage contract is subject to COGSA, and clause sixteen recites provisions of COGSA section 4(5), 46 U.S.C.A. App. Section 1304(5), limiting Mar's liability for loss to $500 per package. Clause sixteen states,

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[4] the Mar bill of lading is illegible. The district court stated that "the size of the letters give[s] new meaning to the words 'fine print.'" We can only agree.

> In case of any loss or damage to or in connection with the goods exceeding $500.00...the value of the goods shall be deemed to be $500.00 per package...unless the nature of the goods and a valuation higher than $500.00 shall have been declared in writing by the shipper upon delivery to the carrier and inserted in this bill of lading and extra freight paid if required...[in which case] the carrier's liability, if any, shall not exceed the declared value....

The Bottacchi bill of lading states that it binds the owner of the cargo and that it supersedes all other agreements covering the shipment. The back of the bill of lading is also in fine print and contains provisions identical to the Mar bill of lading.[5]

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[5] The fine print on the Bottacchi bill of lading is clearer than that on the Mar bill of lading and can be read with the naked eye.

Mar had filed a tariff with the Federal Maritime Commission. The tariff included a copy of Mar's bill of lading. Rule Twelve of the tariff provided for a declaration of increased valuation that would increase Mar's liability beyond $500 per package. In case of a declaration of excess value, Mar's tariff provided for additional freight charges. Bottacchi also had filed a tariff with the Federal Maritime Commission. Rule Twelve, "Ad Valorem Rates," states that "[a]n ad valorem or 2% value to be declared on bill of lading, shall be assessed on the following: Currency, Specie, Gold or Silver Bullion, Precious Metals N.O.S., and Negotiable Securities. Minimum bill of lading charge--$101.50."

Edusystems' freight forwarder, Meadows, and Mar's freight forwarder, Continental, had dealt with one another on numerous occasions.

Meadows has acted as freight forwarder for Edusystems hundreds of times. One none of these occasions did Edusystems' representative declare the value of a shipment and pay added freight charges.

B. *Proceedings in the District Court*

On March 28, 1986, Edusystems' insurer, Insurance Company of North America (the "plaintiff"),[6] filed a complaint against the M/V Ocean Lynx, in *rem*, Mar, Bottacchi, and Nobadi Maritime, S.As., claiming $244,-820 damages for the lost cargo.[7] Mar and Bottacchi answered asserting that their

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[6] The plaintiff had issued marine insurance covering the shipment of this cargo. The plaintiff paid Edusystems a total of $201,972 on the loss of the cargo.

[7] The Ocean Lynx and Nabadi Maritime were never served and are not involved in this appeal.

liability was limited to $500 per package under COGSA. Mar also filed a cross-claim against Bottacchi for Mar's damages, interest and costs in the action.

On January 9, 1987, Mar served the plaintiff with an offer of judgment of $29,-500 plus interest and costs.[8] On the same day, Bottacchi served Mar with an offer of judgment of $34,500.[9] The plaintiff and Mar rejected these offers.[10]

The district court held a bench trial on

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[8] This offer provided $500 per package of cargo lost.

[9] Bottacchi asserts that $34,500 reflected $500 per package in damages plus pre-judgment interest and costs up to January 8, 1987.

[10] Bottacchi's offer of judgment inexplicably is not included in the record on appeal.

September 8-9, 1987. The court found that under COGSA section 4(5) Mar's and Bottacchi's liability was limited to $500 per package lost. The court rejected the plaintiff's argument that Mar's bill of lading was illegible and therefore did not invoke COGSA section 4(5)'s limitation on liability. The court found that the print on the back of the Mar bill of lading appeared blurry, but stated that "[w]ith the aid of a magnifying glass...most of the words and numerals can be read by a party examining the words and conditions stated therein." Nevertheless, the court found that the Mar bill of lading was sufficient in incorporate COGSA section 4(5)'s limitation of liability.

The court also rejected the plaintiff's argument that COGSA section 4(5) did not apply because Mar and Bottacchi did not present Edusystems with an opportunity to declare the

cargo's value. The court stated that incorporation of COGSA in the bills of lading provided a fair opportunity to declare excess value as a matter of law. The court also found that Mar's tariff was valid and presented the plaintiff with an opportunity to declare the cargo's value. Accordingly, the district court entered judgment for the plaintiff against Mar for $29,500 on the plaintiff's complaint and judgment for Mar against Bottacchi for $29,500 on Mar's cross-claim.

On January 8, 1988, Mar moved to recover attorneys fees and costs from Bottacchi from defending against the plaintiff's claim and to recover costs from the plaintiff. Mar claimed that it was entitled to attorneys' fees from Bottacchi for defending the main claim because it was an indemnitee of Bottacchi. Mar claimed that it was entitled to costs accrued

after January 22, 1987 from the plaintiff because the plaintiff refused Mar's offer of judgment.[11] On January 15, 1988, Bottacchi moved the court to deny Mar pre-judgment interest and to tax costs against Mar because Mar rejected Bottacchi's offer of judgment.

In an order dated February 22, 1989, the district court granted Mar's motion against Bottacchi, awarding Mar $22,262 in attorneys' fees. The court also awarded Mar $563 in costs against the plaintiff. Finally, the court denied Bottacchi's motion to limit Mar's pre-judgment interest and awarded Mar the same amount of pre-judgment interest from Bottacchi as the court had awarded the plaintiff from Mar.

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[11] By asserting entitlement to costs after January 22, 1987, Mar allowed the plaintiff 10 days plus three days for mailing to Mar's offer of judgment.

In this appeal, we first consider whether the district court erred in holding that Mar and Bottacchi have limited liability under COGSA section 4(5). Second, we consider whether the district court erred in holding that Mar could recover attorneys' fees from Bottacchi from the cost of defending against the Plaintiff's claim. Finally, we consider whether the district court erred in ruling that Mar could recover pre-judgment interest from Bottacchi for a period after Bottacchi's offer of judgment.

II. STANDARD OF REVIEW

The district court's interpretation of a statute is subject to *de novo* review by this Court. *Keys Jet Ski, Inc. v. Kays*, 893 F.2d 1225, 1227 (11th Cir. 1990). The district court's findings of fact are subject to "clearly erroneous" review in this Court. *Anderson v. Bessemer City*, 470 U.S. 564, 573,

105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

III. ANALYSIS

A. *Limited Liability*

COGSA section 4(5) provides as follows:

> Neither the carrier nor the ship shall in any event become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package...unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

46 U.S.C.A. App. Section 1304(5). Congress enacted the COGSA limitation on liability in 1936 in order to restrain the superior bargaining power wielded by carriers over shippers by setting a reasonable limitation on liability that the carrier could not reduce by contract. *Sony Magnetic Prods., Inc. vs. Merivienti O/Y*, 863 F.2d 1537, 1542

(11th Cir. 1989).

Courts have develop two preconditions to involving COGSA section 4(5)'s limitation on liability. First, the carrier must give the shipper adequate notice of the $500 limitation by including a "clause paramount" in the bill of lading that expressly adopts the provisions of COGSA. *Brown & Root, Inc. vs. M/V Peisander*, 648 F.2d 415, 420 (5th Cir. 1981); *General Elec. Co. v. MV Nedlloyd*, 817 F.2d 1022, 1029 (2d Cir. 1987); 46 U.S.C.A. App. Section 1312. Second, the carrier must give the shipper a fair opportunity to avoid COGSA section 4(5)'s limitation by declaring excess value. *Brown & Root*, 648 F.2d at 420 & N.11; *General Elec.*, 817 F.2d at 1028.

The clause paramount establishes three things. First, it makes COGSA applicable at times when it would not apply of its own force. *Brown & Root*, 648 F.2d at 420.

Second, COGSA's provisions are deemed incorporated into the bill of lading. *Id.* Third, nothing in the bill of lading can increase the carrier's liability under COGSA, which overrules any clause in the bill of lading that conflicts with COGSA. *Id.*

The *Brown & Root* court discussed what is necessary for a carrier to meet the second precondition to involving COGSA section 4(5)'s limitation on liability: that the carrier afford an opportunity for the shipper to declare excess value. In *Brown & Root*, the carrier had included a clause paramount in its bill of lading. The bill of lading, however, also included a clause stating that "in no case" would the liability of the carrier exceed $500. Moreover, the bill of lading contained no blank space where the shipper could write in excess valuation. Nevertheless, the court found that the shipper

had an opportunity to declare excess valuation for two reasons:

> First, COGSA was expressly incorporated in the bill of lading to thereby bring into play Section 4(5). Next, and far more significantly, the published tariff which has the effect of law very carefully gave [the s]hipper a choice of valuations by a choice of precisely definable freight rates.

Id. at 424 (citations omitted). *Brown & Root* thus adopted a system of constructive notice of an opportunity to declare excess valuation. *Id.* Either a clause paramount in the bill of lading or a valid tariff filed with the Federal Maritime Commission that includes an opportunity to declare excess value according to COGSA section 4(5)'s provisions is sufficient to afford the shipper an opportunity to declare excess value. *Brown &*

Root, 648 F.2d at 424.

In the present case, the plaintiff first argues that the Mar bill of lading was illegible and therefore did not provide shippers with notice of COGSA section 4(5)'s limitation on liability. The plaintiff also argues that Bottacchi's tariff failed to provide shippers with an opportunity to declare excess value.

1. Mar's Bill of Lading

The district court found that the back of Mar's bill of lading, which contained a clause paramount and a clause reciting COGSA section 4(5), could not be read without the aid of a magnifying glass.[12] In *Nemeth v. General S.S. Corp.*, 694 F.2d 609, 611-12 (9th

[12] The mar bill of lading in the present case was doubly unreadable because it had been photocopies many times, leaving the fine print on the reverse side completely indecipherable.

Cir.1982), the Ninth Circuit held that "microscopic" print on a bill of lading was insufficient to give the shipper a fair opportunity to avoid COGSA section 4(5). This holding is persuasive; print that cannot be read with the naked eye can hardly impart notice. In the present case, however, Meadows, Edusystems' agent, maintained multiple copies of the Mar master bill of lading in its files,[13] and yet Meadows' representative, Albert Fabrikant, testified that in preparing hundreds of bills of lading for Edusystems he had never read the provisions on the reverse side. Meadows certainly had an opportunity to read these

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[13] Meadows actually prepared the Mar bill of lading in the present case.

copies of Mar's bill of lading.[14] Accordingly, the plaintiff's argument that Edusystems was not afforded an opportunity to avoid COGSA section 4(5)'s limitation of liability lacks merit. *See Cincinnati Milacron, Ltd. vs. M/V American Legend*, 784 F.2d 1161, 1166 (4th Cir.) (Phillips, J., dissenting), *rev'd*, 804 F.2d 837 (4th Cir. 1986) (*en banc* court reversed panel opinion on the basis of dissent of Phillips, J.); *Carman Tool & Abrasives, Inc. v. Evergreen Lines*, 871 F.2d 897, 900 n. 6 (9th Cir. 1989); *Aetna Ins. Co. v. M/V Lash Italia*, 858 F.2d 190, 194 (4th Cir. 1988); *see also First Pennsylvania Bank v. Eastern Airlines, Inc.* 731 F.2d 1113, 1122 (3rd Cir. 1984).

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[14] Some of Mar's bills of lading were printed clearly. *See* Mar shipping Lines' Memorandum of Law in Opposition to Plaintiff's Motion for Partial Summary Judgment, Exhibit A.

The plaintiff also fails to address the district court's holding that Edusystems did not desire to avoid COGSA section 4(5)'s limitation on liability by opting for a higher freight charge. The court found that Edusystems had chosen to rely on its policy with the plaintiff to cover any losses. In *General Elec.*, the Second Circuit ruled that where the shipper was experienced and the record showed that the shipper had never taken any steps toward actually declaring excess value, the court would not allow the shipper to challenge the adequacy of its opportunity to declare excess value. *General Elec.*, 817 F.2d at 1029. Similarly, in the present case, Edusystems had made hundreds of shipments with Mar without ever inquiring into declaring excess value. Under these circumstances it is reasonable to conclude that Edusystems did not wish to insure against losses twice and chose

to rely on its policy with the plaintiff.

2. Bottacchi's Tariff

[8] Rule 12 of Bottacchi's tariff provides that an *ad valorem* rate shall be applied to shipments of certain commodities. It does not provide for the method through which a shipper of goods other than the listed commodities can avoid COGSA section 4(5)'s limitation on liability. Bottacchi's bill of lading, however, does contain a clause paramount invoking the provisions of COGSA, and clause sixteen of Bottacchi's bill of lading recites the provisions of COGSA section 4(5). In *Brown & Root*, the court found that such a clause was sufficient to give the shipper constructive notice of a fair opportunity to declare excess value. "COGSA was expressly incorporated into the bill of lading to thereby bring into play Section 4(5)." *Id.* at 424. Once COGSA was

incorporated, the court held, the provisions of COGSA section 4(5) spelled out how a shipper could declare excess value, and the burden was on the shipper to declare excess value. *Id.* at 425.

> COGSA Section 4(5) does not prescribe that the face of the bill of lading contain a specific space or blank in which the increased valuation is to be inserted nor does it provide that the carrier rather than the shipper must actually make the notation. The phrase "unless the nature and value of such goods have been declared by the shipper before shipment and inserted into the bill of lading" [, COGSA Section 4(5),] clearly puts the burden on the shipper to make the determination as between value limitations and the making of the declarations.

Id. at 424. Accordingly, the plaintiff's argument based on Bottacchi's tariff lacks merit.

B. *Attorneys' Fees*

1. Indemnity Action

Bottacchi argues that the district court erred in awarding attorneys' fees to Mar for defending against the plaintiff's claim. Bottacchi argues that Mar's claim is governed by COGSA, which does not provide for attorneys' fees, and therefore under the American Rule Mar cannot recover attorneys' fees. Mar argues that it was Bottacchi's indemnitee and therefore can recover attorneys' fees expended in defending against the plaintiff's claim.[15]

Congress has not explicitly provided for

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[15] Mar acknowledges that it cannot recover attorneys' fees expended in its indemnification action against Bottacchi.

the award of attorneys' fees in COGSA actions. *Noritake Co. v. M/V Hallenic Champion*, 627 F.2d 724, 730 (5th Circ. Unite A 1980). In admiralty cases, moreover, the general rule is that attorneys' fees are not awarded. *Platoro Ltd. v. Unidentified Remains of a Vessel*, 694 F.2d 893, 905 (5th Cir. 1983). In the case of an indemnitee, however, the indemnitee can recover attorneys' fees from his indemnitor as part of the reasonable expenses of defending a claim. *See Cotten v. Two "R" Drilling Co.*, 508 F.2d 669, 671 (5th Cir. 1975); *Noritake*, 627 F.2d at 724 n. 5; *see also Maseda v. Honda Motor Co.*, 861 F.2d 1248, 1256 (11th Cir. 1988)(Florida law); *Nitram, Inc. v. Cretan Life*, 599 F.2d 1359, 1372 (5th Cir. 1979).

Bottacchi claims that the present case was not an indemnity action, pointing to the form of the district court's judgment, which

did not use the term "indemnity." Bottacchi also argues that COGSA provided Mar's exclusive remedy in this case, and that therefore Mar's case could not have been one for indemnification. Mar argues that the pre-trial order in this case stipulated that indemnification was an issue, and that the district court's February 22, 1989 order found that Mar was an indemnitee.

Mar's cross-claim against Bottacchi stated a prima facie case under COGSA. The joint pre-trial stipulation of Mar and Bottacchi, however, stated that Mar "would claim reasonable attorney's fees against A. Bottacchi, S.A. pursuant to [Mar's] cross claim for indemnity."[16] The pre-trial order

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[16] The parties failed to include the pre-trial order in the record on appeal. Accordingly, we rely on the pre-trial stipulation between Bottacchi and Mar.

controls the future course of the action, and Mar was not required to amend the pleadings to reflect the indemnified issue. *Feazell v. Tropicana Prods., Inc.*, 819 F.2d 1036, 1040 (11th Cir. 1987) (pre-trial stipulation); Fed.R.Civ.P. 16(e); 3 J. Moore, *Moore's Federal Practice* Section 16.12 (2d ed. 1989).

The real parties in interest in this case were the plaintiff and Bottacchi, and any claims recoverable by the plaintiff against Mar also would have been recoverable by Mar against Bottacchi. Mar's expenditures defending the main claim, moreover, benefitted Bottacchi by limiting Bottacchi's liability. Under these circumstances, we hold that Mar was an indemnitee of Bottacchi and can recover attorneys fees. *Cf. Strachan Shipping Co. vs. Koninklyke Nederlandsche Stoomboot Maalschappy, N.V*, 324 F.2d 746 (5th Circ. 1963) (where jury found that carrier acted

properly and stevedore acted negligently causing injury, carrier could recover from the stevedore attorneys' fees expended defending the main action despite the absence of an express contract of indemnification).

2. Attorneys Fees and COGSA Section 4(5)

[13] Bottacchi also argues that Mar's attorneys' fees are part of Mar's overall damages in this case and therefore limited by COGSA section 4(5). Mar argues that attorneys' fees are excluded from the calculation of general damages under COGSA, and that therefore attorneys' fees do not fall under the $500 per package limitation that is applied to damages under COGSA. The district court found that the language in clause sixteen of Bottacchi's bill of lading, which recited provisions of COGSA section 4(5), was distinguishable from "red letter" clauses limiting liability for "any claim." The court

found that

> [c]lause sixteen attempts to do no more than protect a carrier against exposure to substantial liability for the loss of highly valuable cargo when the shipper has not declared the higher value and paid an additional freight charge on it. For this reason, clause sixteen does *not* operate as a red-letter clause.

The district court' interpretation of COGSA section 4(5) is correct. The statute does not purport to include all types of claims in the $500-per-package limitation. *Cf. Noritake*, 627 F.2d at 729 (awarding pre-judgment interest in a COGSA action). Accordingly, Mar's attorneys' fee claims are not limited by COGSA section 4(5).

C. *Mar's Pre-Judgment Interest*

As a general rule, pre-judgment interest should be awarded in admiralty cases. Pre-

judgment interest is nota penalty, but compensation to the plaintiff for the use of funds that were rightfully his. *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1550 (11th Cir. 1987) (citing *Noritake*, 627 F.2d at 728). The court has discretion to deny pre-judgment interest only when "peculiar circumstances" make it inequitable for the losing party to pay pre-judgment interest. *Id.; Parker Towing Co. vs. Yazoo River Towing, Inc.*, 794 F.2d 591, 594 (11th Cir. 1986)(peculiar circumstances include cases involving a genuine dispute about liability and cases of apportioned fault). We review the district court's decision on whether to award prejudgment interest for abuse of discretion. *Parker Towing*, 794 F.2d at 594.

In the present case, the district court found that no peculiar circumstances existed to justify denying pre-judgment interest.

Bottacchi argues that its offer of judgment was a peculiar circumstances and that therefore the district court abused its discretion in denying pre-judgment interest in this case. Bottacchi's argument does not take into account Mar's simultaneous offer of judgment to the plaintiff, which the plaintiff rejected. I would have been foolish for Mar to accept Bottacchi's offer of judgment after the plaintiff rejected Mar's offer.[17] Accordingly, the district court did not abuse its discretion in holding that peculiar circumstances did not exist in this case precluding an award of pre-judgment interest.

IV. CONCLUSION

We AFFIRM the district court's holding

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[17] The district court' December 29, 1987 judgment taxed exactly the same amount of prejudgment interest against Mar in favor of the plaintiff as it taxed against Bottacchi in favor of Mar.

that Mar and Bottacchi have limited liability under COGSA and the district court's awards of attorneys' fees and pre-judgment interest.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

89-5301

INSURANCE COMPANY OF NORTH AMERICA,

Plaintiff-Appellee
-Cross Appellant,

versus

M/V OCEAN LYNX, a/k/a M/V OCEAN LINK, her engines, tackle, furnishings, etc. IN REM, ET AL,

Defendants,

Mar Shipping Line, Inc., a foreign corporation,

Defendant-Appellee, Cross-Appellee,

A. Bottacchi S.A. De Navegacion, a foreign corporation,

Defendant-Appellant-Cross-Appellee.

Appeal from the United States District Court for the Souther District of Florida

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ON PETITION(S) FOR REHEARING
(June 20, L990)

BEFORE: JOHNSON, Circuit Judge, HILL*, and HENLEY**, Senior Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant-Cross-Appellee A BOTTACCHI S.A. DE NAVEGACION is *denied*.

ENTERED FOR THE COURT:

_____
United States Circuit Judge

*See Rule 34-2 (b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable J. Smith Henley, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

(2)

No. 90-662

Supreme Court, U.S.
FILED
NOV 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

INSURANCE COMPANY OF NORTH AMERICA,

Petitioner,

v.

M/V "OCEAN LYNX," a/k/a/ M/V "OCEAN LINK," her engines, tackle, furnishings, etc., *in rem*, MAR SHIPPING LINE, INC.; and A. BOTTACCHI S.A. DE NAVEGACION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals' holding that BOTTACCHI provided the shipper with a fair opportunity to avoid the COGSA $500.00 package limitation where its bill of lading contained a clause paramount invoking the provisions of COGSA and a clause which specifically stated that a shipper may avoid the $500.00 per package limitation by declaring the nature of the goods and a valuation higher than $500.00 in writing, and inserting this in the bill of lading, and paying extra freight if required is in direct conflict with any decisions of this Court.

2. Whether the Court of Appeals' findings with regard to fair opportunity and the legibility of the bill of lading are in direct conflict with the prior findings of the Ninth and Fourth Circuits.

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No. 90-662

In The

Supreme Court of the United States

October Term, 1990

INSURANCE COMPANY OF NORTH AMERICA,

Petitioner,

v.

M/V "OCEAN LYNX," a/k/a/ M/V "OCEAN LINK," her engines, tackle, furnishings, etc., *in rem*, MAR SHIPPING LINE, INC.; and A. BOTTACCHI S.A. DE NAVEGACION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

OPINION BELOW

The Opinion of the Court of Appeals is reported at 901 F.2d 934 (11th Cir. 1990).

JURISDICTION

The Judgment of the Court of Appeals was entered on August 14, 1990. The Petition for Writ of Certiorari

was filed on September 18, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondents, MAR SHIPPING LINE, INC. and A. BOTTACCHI S.A. DE NAVEGACION, have joined in their Brief in Opposition to the Petition for Certiorari. The parties shall be referred to as the Petitioner, the Respondents or by name for added clarity.

The Respondents object to the Petitioner's Statement of the Case as an incomplete and incorrect statement. The Petitioner failed to state that the BOTTACCHI bill of lading contains a clause paramount which invokes the provisions of the Carriage of Goods by Sea Act, ("COGSA") 46 U.S.C. 1300 *et seq.* and a clause which specifically provides that a shipper may avoid the $500.00 package limitation by declaring the nature of the goods and a valuation higher than $500.00 in writing, and inserting this in the bill of lading and paying extra freight if required. (A-22). Petitioner further fails to state that the District Court and Court of Appeals specifically found that the Petitioner's assured evidenced a clear intent not to declare the nature and value of its shipment in writing, insert this in the bill of lading, and pay a higher freight, if any. (A-21).

Petitioner incorrectly states that the Court of Appeals found the MAR bill to be illegible. On the contrary, the Court of Appeals found that some of the MAR bills of lading were printed clearly. (A-20). The Court of Appeals also noted that the District Court found that the MAR bill

of lading could be read with the aid of a magnifying glass. (A-18). The District Court also read the relevant portions of the MAR bill of lading into the record at trial.

ARGUMENT

I. THE COURT OF APPEALS' HOLDING THAT BOTTACCHI PROVIDED THE SHIPPER WITH A FAIR OPPORTUNITY TO AVOID THE COGSA $500.00 PACKAGE LIMITATION WHERE ITS BILL OF LADING CONTAINED A CLAUSE PARAMOUNT INVOKING THE PROVISIONS OF COGSA AND A CLAUSE WHICH SPECIFICALLY STATED THAT A SHIPPER MAY AVOID THE $500.00 PER PACKAGE LIMITATION BY DECLARING THE NATURE OF THE GOODS AND A VALUATION HIGHER THAN $500.00 IN WRITING, AND INSERTING THIS IN THE BILL OF LADING, AND PAYING EXTRA FREIGHT IF REQUIRED IS NOT IN DIRECT CONFLICT WITH ANY DECISIONS OF THIS COURT.

Petitioner contends that a carrier who permits a shipper to avoid the $500.00 per package COGSA limitation by declaring in writing the nature and value of the shipment, and inserting this information in the bill of lading, has not provided the shipper with a fair opportunity to avoid the $500.00 per package COGSA limitation unless the shipper is charged a higher freight rate when exercising this option. This illogical contention raises no issue warranting review by this Court.

COGSA imposes no requirement upon the carrier to charge a shipper a higher freight rate when declaring the nature and value of a shipment so as to avoid the $500.00 per package COGSA limitation. COGSA only requires

that "the nature and value of [the] goods have been declared by the shipper before shipment and inserted in the bill of lading." BOTTACCHI clearing complied with this requirement by virtue of the clause paramount in the bill of lading. The clause paramount establishes that: (1) COGSA is applicable at times when it would not apply of its force; (2) COGSA's provisions are deemed incorporated into the bill of lading; and (3) nothing in the bill of lading can increase the carrier's liability under COGSA, thereby overruling any clause in the bill of lading which conflicts with COGSA. *Brown & Root, Inc. v. M/V "PEISANDER,"* 648 F.2d 451, 420 (5th Cir. 1981). The BOTTACCHI bill of lading also contains a clause which recites the provisions of the COGSA $500.00 per package limitation, 46 U.S.C. 1304(5). This clause provides the shipper with constructive notice of the fair opportunity to declare an excess value and spells out how the shipper can declare an excess value. *Id.* at 424-425.

None of the cases which the Petitioner claims are in conflict with the Court of Appeals' decision involved an action under COGSA. In addition, contrary to the Petitioner's contention, none of the decisions hold that a carrier is required to charge a shipper at higher freight rate in order for the shipper to avoid a limitation of liability. The *New York, N.H. & Hartford R. Co. v. Nothnagle,* 347 U.S. 128, 73 S.Ct. 986, 97 L.Ed. 1500 (1953) decision holds that a carrier subject to the Interstate Commerce Act could not limit its liability for a claim of lost baggage pursuant to a limitation of liability provision in its tariff which the passenger had no reasonable opportunity to discover. The *Boston & Maine R. Co. v. Piper,* 246 U.S. 439, 38 S.Ct. 354, 62 L.Ed. 820 (1918) decision holds that a

carrier subject to the Interstate Commerce Act could not contractually exempt itself from liability for its own negligence in exchange for a reduced freight rate. The *Union Pacific L. Co. v. Burke*, 255 U.S. 317, 41 S.Ct. 283, 65 L.Ed. 656 (1921) decision holds that a carrier subject to the Interstate Commerce Act could not limit its liability pursuant to a limitation of liability clause in its bill of lading and tariff where the shipper was not provided with a means or opportunity to avoid the limitation of liability.

Accordingly, the Court of Appeals' decision is not in conflict with the applicable statute, Supreme Court decisions, or other Court of Appeals' decisions and the Petition for Writ of Certiorari should be denied.

II. THE COURT OF APPEALS' FINDINGS WITH REGARD TO FAIR OPPORTUNITY AND THE LEGIBILITY OF THE BILL OF LADING ARE NOT IN DIRECT CONFLICT WITH THE PRIOR FINDINGS OF THE NINTH AND FOURTH CIRCUITS.

The issue of fair opportunity has been addressed repeatedly by all the circuits dealing in COGSA cases. In all cases, the courts have looked at the evidence before them regarding a short form bill of lading, a long form bill of lading, the tariff and the experience of the shipper or its agents. The decisions of the 9th Circuit have in some cases been more stringent on the requirements for the finding of "fair opportunity." More recently however, on two occasions the 9th Circuit has refused to extend the definition further.

In *Carmen Tool & Abrasives Inc. v. M/V Ever Giant, Evergreen Lines*, 871 F.2d 897 (9th Cir. 1989), the court

refused to extend the concepts of fair opportunity in a situation where a shipper did not receive the bill of lading prior to departure of the vessel in order for notice to be sufficient.

In *Institute of London Underwriters and Ferguson and Co. v. Sea-Land Service, Inc.*, 881 F.2d 761 (9th Cir. 1989), the Court stated that if the bill of lading contains a clause expressly stating that the shipper has an opportunity to avoid the $500.00 package limitation by declaring a higher value, that will constitute *prima facie* evidence of fair opportunity. In *Institute of London*, the 9th Circuit affirmed findings of the District Court regarding the shippers sophistication as relevant toward the finding of fair opportunity.

The issue of opportunity in this case is not in any way consistent factually with that in the 9th Circuit case of *Pan American World Airways, Inc. v. California Stevedoring & Ballast Company*, 559 F.2d 1173 (9th Cir. 1977) as cited by Petitioner. In that case, the Court found that language on the reverse of the bill of lading did not provide for proper notice since it did not track the language of COGSA. Additionally, there were no other factors offered or considered such as the tariff or other reasonable means of notice.

The 4th Circuit has similarly stated its requirements for fair opportunity based on the facts. Petitioner asserts that the 4th Circuit requires the liability language on the face of the bill of lading citing *Cincinnati Milacron, Ltd. vs. M/V American Legend*, 784 F.2d 1161 (4th Cir. 1986). The case cited by Petitioner has been reversed by the 4th Circuit on rehearing, *en banc*, 804 F.2d 837 (4th Cir. 1987).

The Court reversed for the reasons stated in the dissent. The dissent stated that the limitation need not appear on the face of the bill of lading and held:

> "while it may indeed be unfair to hold the newcomer or unsophisticated shipper to the terms of COGSA when they nowhere appear in the shipping documents, it does not seem unduly burdensome to impute to shippers, knowledge to all of the terms in the more accessible long form bill of lading including, where they appear, the applicable provisions of COGSA." at pg. 2160.

The 4th Circuit in *Mu, Inc. v. Puerto Rico Maritime Shipping Authority*, 829 F.2d 1120 (4th Cir. 1987) reviewed its holding in *Cincinnati Milacron*, and held that a short form bill of lading not stating the limitation which incorporates a long form bill which did contain the language was sufficient opportunity. Of particular importance against Petitioner's argument in support of writ of certiorari is the fact that the 4th Circuit stated in *Mu*, at pg. 350, that "Mu failed to provide any evidence that it would have declared a higher value and paid a higher rate." This finding, or its underlying theory, is largely consistent with the basis considered by the 11th Circuit in its holding in this case.

In *Aetna Insurance Company v. M/V Lash Italia*, 858 F.2d 190 (4th Cir. 1988), the 4th Circuit found that an experienced shipper who made no inquiry into declaring a higher value demonstrates that it "made a business judgment . . . not to explore the possibility of obtaining greater protection . . . at a higher rate." at pg. 140.

As in this case, the court in *Aetna* considered various factors to address fair opportunity. The Court found that

there was a clause on the back side stating the limitation language and further that the tariff on file gave notice as well. It is not currently the position of the 4th Circuit, as stated by Petitioner, that the language must appear on the front side.

The 11th Circuit affirmed the Southern District of Alabama in *Sony v. Merivienti*, 863 F.2d 1537 (11th Cir. 1989), and held that where the bill of lading contains the language, an experienced shipper can be deemed to have the knowledge of section 4(5) of COGSA and must bear the costs of non-declaration. That holding is consistent with the 11th Circuit's holding in this case. In *Sony*, supra, the 11th Circuit cited *Brown and Root, Inc. v. M/V Peisander*, 648 F.2d 415 (5th Cir. 1981), a 5th Circuit case on similar issues.

In the case at bar, the 11th Circuit found that the freight forwarder who in fact authored these bills of lading, was in possession of master bills which were legible, but that by their own testimony they had not read. Eleventh Circuit's opinion at 2690.

In addition, they found that MAR SHIPPING LINE, INC's, tariff on file, provided the shipper with information had they intended to make use of it.

Finally, the Court looked at the experience of the shipper and its freight forwarder and weighed it in with the facts before them.

The 11th, 4th and 9th circuits, in addressing cases involving legibility and fair opportunity have considered the prior findings of each other and have decided cases based upon their facts. All concur that the burden of

proof of showing lack of opportunity shifts to the shipper once a *prima facie* showing is made.

The Courts have then addressed the facts before them, whether they refer to a short form, long form, tariff or other outside consideration.

In the case at bar as in other cases of the 4th and 9th Circuits, the Court found that fair opportunity was given on the basis of one or more of the factors, namely the tariff contained the limitation, the backside could be read with a magnifying glass, the shipper's agent had legible masters in its offices and the sophisticated shipper lacked intention to declare the higher value.

Respondent MAR SHIPPING LINE, INC. respectfully contends that there is no direct conflict with respect to the issue raised by Petitioner among the 4th and 9th and 11th Circuits and the findings of the 11th Circuit are consistent with the applicable decisions and the facts of this case.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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NO. 90-662

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Petitioner

vs.

M/V OCEAN LYNX, a/k/a M/V OCEAN LINK, her engines, tackle, furnishings, etc., in rem, MAR SHIPPING, INC., a foreign corporation, A. BOTTACCHI S.A. DE NAVEGACION,a foreign corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUPPLEMENT TO PETITION FOR
WRIT OF CERTIORARI
U.S. DISTRICT COURT OPINION

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UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA

INSURANCE COMPANY OF NORTH AMERICA,

Plaintiff,

vs.

MAR SHIPPING LINE, INC., a foreign corporation and A. BOTTACCHI S.A. DE NAVEGACION, a foreign corporation,

Defendants.

CASE NO.: 86-0650
CIV-HASTINGS

FINAL JUDGMENT

On the Findings of Fact and Conclusions of Law entered herein, it is hereby

ORDERED AND ADJUDGED that Plaintiff INSURANCE COMPANY OF NORTH AMERICA have and recover the sum of $29,500.00 against defendant MAR SHIPPING LINE, INC., together with prejudgment interest[1] of 7.70% per annum

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[1] Prejudgment interest is allowed in admiralty cases. Self v. Great Lakes Dredge & Dock Company, et al., 832 F.2d 1540 (11th Cir. 1987).

from June 7, 1985, plus interest from the date of entry of this judgment at the rate of 7.22% per annum.

IT IS FURTHER ORDERED AND ADJUDGED that MAR SHIPPING LINE INC. have and recover the sum of $29,500.00 against the defendant A. BOTTACCHI S.A. DE NAVEGACION, together with prejudgment interest of 7.70% per annum from June 7, 1985, plus interest from the date of entry of this judgment at the rate of 7.22% per annum

DONE AND ORDERED at Miami, Florida, this 29 day of December, 1987.

original signed
UNITED STATES DISTRICT JUDGE
ALCEE L. HASTINGS

Copies to:

Mary Lou Rodon-Alvarez, Esquire
Allan R. Kelley, Esquire
G. J. Rod Sullivan, Jr., Esquire

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA

INSURANCE COMPANY OF NORTH AMERICA,

Plaintiff,

vs.

M/V OCEAN LYNX, also known as M/V OCEAN LINK, her engines, tackle, furnishings, etc., IN REM; MAR SHIPPING LINE, INC., a foreign corporation and A. BOTTACCHI S.A. DE NAVEGACION, a foreign corporation,

Defendants.

CASE NO.: 86-0650
CIV-HASTINGS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE was tried to the Court, sitting without jury, and after considering the stipulations of the parties, the testimony of witnesses, and the documentary and physical evidence, the Court makes the following findings of fact and conclusions of law.

INTRODUCTION

On or about June 7, 1985, the M/V Ocean

Lynx[1] was at sea en route to Buenos Aires, Argentina, following its departure from Miami. After encountering southwesterly winds and rough seas, three successive heavy waves struck the vessel causing it to roll more than 35 degrees to each side. The severe roll caused five containers to burst their lashings and wash overboard.

One of the containers lost at sea contained 56 boxes and 3 crates of vocational agricultural machinery and parts. These items were insured under a marine cargo policy provided by the plaintiff. A proper claim was filed and a settlement draft issued to the shipper. Thereafter, this action was commenced. MAR SHIPPING LINE, INC. has since

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[1] This is the correct name of the vessel. The parties agree that the name "Ocean Link" appears to have found its way into this case as a product of scriveners error.

filed a cross-claim against A. BOTTACCHI S.A. DE NAVEGACION.

I. FINDINGS OF FACT[2]

1. The plaintiff Insurance Company of North America ("INA"), is a corporation organized under the laws of Pennsylvania. INA is engaged in the insurance of marine cargo.

2. The defendant MAR Shipping Line, Inc. ("MAR"), is a corporation organized under the laws of Florida. MAR is a non-vessel operating common carrier ("NVOCC").[3]

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[2] To the extent that the findings of fact are interpreted as conclusions of law, they are so considered. Conversely, to the extent that the conclusions of law are interpreted as findings of fact, they too are so considered.

[3] Title 46 C.F.R. Section 510.2(k) (1986) provides that a "'non-vessel-operating carrier' means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier."

3. Defendant A. BOTTACCHI S.A. De NAVEGACION ("BOTTACCHI") is a corporation organized and existing under and by virtue of the laws of the Republic of Argentina. BOTTACCHI conducts business in Florida as a common carrier[4] of merchandise by water for hire and at the time was operating the M/V Ocean Lynx.

4. The M/V "OCEAN LYNX" is a three-decked general cargo/container vessel with six holds and fourteen hatches.

5. Educational Innovation Systems International ("Edusystems") is a corporation organized under the laws of Wisconsin. Edusystems is engaged in, inter alia,

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[4] Title 46 C.F.R. Section 510.2 (e) (1986) provides that "'common carrier' means any person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country."

providing vocational agricultural machinery and parts to South America.

6. S.E.L. Maduro (Florida), Inc. ("Maduro") is a corporation organized under the laws of Florida. Maduro provides agency, stevedoring and terminal services at Miami, Florida.

B. The Facts

7. On April 24, 1985, Edusystems sold ten crates of vocational agricultural machinery and parts to the Ministry of Public Health and Welfare in Asuncion, Paraguay. The equipment sold for $77,748.40 and was insured with INA in the amount of $85,600[5] under special marine policy No. C325426. On April 30, 1985, Edusystems sold 56 boxes of vocational agricultural machinery to the

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[5] This amount represents cost, insurance and freight (CIF) plus ten percent.

Ministry of Culture and Education, also in Asuncion. This equipment was sold for $134,618.77 and was insured for $159,220.00 under special marine policy No. C325431.[6]

8. At its plant in Fontana, Wisconsin, Edusystems loaded and sealed the 56 boxes of equipment in container number ADCU-202107-6. The container and nine crates arrived by rail in Miami, via Chicago, Illinois. The remaining tenth crate was shipped by Edusystems from London, England to Miami.

9. Edusystems employed the services of a freight forwarder, Meadows Wye and Company in Miami, to arrange for the booking of the two shipments. Meadows Wye had acted as freight forwarder for Edusystems on prior shipments to Paraguay.

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[6] This amount represents CIF value plus twenty percent.

10. At its terminal in Miami, Meadows Wye loaded and resealed three of the Edusystems crates (crate Nos. 4, 9, and 10) into container ADCU-202107-6.

11. Meadows Wye enlisted MAR to provide the carrier services and prepared the MAR master bills of lading on the two shipments. MAR, a NVOCC, was the only carrier in Miami at the time handling cargo en route to Asuncion. Meadows Wye understood and agreed that MAR would transport the equipment via BOTTACCHI.

12. Meadows Wye had conducted business in the past with MAR, BOTTACCHI and the M/V OCEAN LYNX in a container carrier capacity. Meadows Wye maintained a blank BOTTACCHI bill of lading at its offices in Miami.

13. MAR received the master bills of lading prepared by Meadows Wye on or about May 9, 1985 for completion of the freight rating in the lower portion of each form. Each bill

of lading was accompanied by a separate Shipper's Export Declaration ("SED") form for delivery to the United States Customs Service in Miami.

14. Each SED contains various information regarding the shipment. In this case, the block designated as No. 2 shows the method of transportation to be by vessel. Block 2a lists MAR as the shipper, while Block 3 shows Edusystems as the exporter. Block 4, which requests the agent of the exporter, lists the name of Meadows Wye. Block 5 shows the consignee as Ministerio de Educacion y Culto, Asuncion, Paraguay. Block 10 describes the commodities as "56 CARTONS STC MACH & TOOLS." Finally, Block 15 indicates the value of this shipment, in U.S. dollars, to be $132,674.

15. The second SED form contains the identical information, but for changes in the

consignee and freight. The consignee is listed as SENASA, Asuncion, Paraguay. Block 10 shows the freight to be "10 PCS. STC MACHINERY & TOOLS." The value of the freight is shown as $77,748.

16. On April 30, 1985, Meadows Wye shipped the loaded container, now carrying 56 boxes and three (3) crates, directly to BOTTACCHI"s terminal operator at the Port of Miami, S.E.L. Maduro. Meadows Wye shipped the remaining seven crates of equipment to Maduro on May 2, 1985. Maduro loaded these seven crates into container UFCU-216939 on May 14, 1985.[7] MAR never took actual delivery of the Edusystems freight.

17. Meadows Wye had not been requested by Edusystems to make a declaration of value

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[7] These seven crates arrived at their destination without incident and do not form part of this action.

nor did Edusystems request under-deck storage of the two shipments to Paraguay. No such request been made on similar machinery shipments handled by Meadows Wye in the past.

18. After receiving the two master bills of lading, MAR completed the freight information and designated each as Nos. AS-01 and AS-02. Both forms are dated May 9, 1985. Bill of lading No. AS-01 was issued for the carriage of one container said to contain 56 boxes of vocational agricultural machinery. No. AS-02 was issued for the carriage of ten crates of machinery and tools.

19. The front of the MAR master bill of lading form contains a masthead with the company's name and address, as well as telex and phone numbers. The base of the form contains a block showing the freight computation, the bill of lading number, the date, and a signature block for MAR Shipping

Line, Inc. It makes no reference to the terms on its reverse side.

20. The back of the MAR bill of lading contains 27 clauses which seem to be a reproduction of the same clauses contained on the back of the BOTTACCHI bill of lading. The clauses on the MAR bill of lading appear blurry. With the aid of a magnifying glass, however, most of the words and numerals can be read by a party examining the terms and conditions stated therein.

21. Directly above Clause 1, the back of the MAR bill of lading states: "The following are the conditions and exceptions referred to on the face of this Bill of Lading." There is, however, no such reference on its face.

22. The first line of Clause 1 provides: "This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States of America

approved April 16, 1938."

23. Clause 16 reads in pertinent part:

> In case of any loss or damage to or in connection with goods exc[illegible letters]ing in actual value $500 lawful money of the United States per package, or in case of goods not shipped in packages per customary freight unit the value of the goods shall be deemed to be $500 per package or per unit on which basis the freight is adjusted...unless the nature of the goods and valuation higher than $500 shall have been declared in writing by the Shipper upon delivery to the Carrier and inserted in this bill of lading and extra freight paid if required...and the Carrier's liability if any shall not exceed the declared value...

24. On May 15, 1985, BOTTACCHI issued its bill of lading no. BAS-014 to MAR for the carriage of the 56 boxes plus the 10 crates from the port of Miami. The original BOTTACCHI bill of lading was prepared by Continental Freight Forwarding, Inc., MAR's freight forwarder. It shows the shipper to be MAR Shipping Line, Inc., as agents of Educational Innovation Systems International,

Inc. The exporting vessel is listed as the M/V OCEAN LYNX. A section of this form, designated as "ONWARD INLAND ROUTING", states: "CORRESPONDE MAR B/L AS-01 / AS-02."

25. The bottom half of the front of the BOTTACCHI bill of lading contains the following section reproduced below:

[Insert copy here]

26. The back of the BOTTACCHI bill of lading contains 27 clauses. Although the print is small, the clauses are entirely legible without the aid of magnifying glass. Clause 1 and Clause 16 of the MAR bill of lading set forth above are identical to the same clause on the BOTTACCHI bill of lading. A comparison of both bills of lading discloses that the illegible word in Clause 16 of the MAR bill of lading above is "exceeding."

27. MAR requested and received from MADURO a correction to manifest No. 149,

dated May 17, 1985. The correction contained four amendments attempting to effect the following changes:

> (a) The name of the shipper was changed to MAR Shipping Line, Inc., thereby removing the words "as agent of Educational Innovation Systems International, Inc.,";
>
> (b) The consignee was changed from Ministerio de Educacion y Culto to "to the order of shipper";
>
> (c) A statement was added in the body of the bill of lading indicating "declared value of goods in Container ADCU 202107-6 U.S.D.156,000.00. Value of goods in UFCU 226939 U.S.D.54,425.00."; and
>
> (d) The spelling of the vessel's name was changed from "Ocean Link" to "Ocean Lynx."

28. After weighing the testimony of the witnesses, and considering their interest in the outcome of the case and their candor and manner of testifying, and to extent to which they have been supported or contradicted by other credible evidence, the Court finds that Correction to Manifest #149 was prepared at

some point in time after the loss occurred.[8]

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[8] Among those facts supporting this finding are:

(a) The chronological correction to manifest log maintained by SEL Maduyro indicates that Corrections to Manifest Nos. 146 and 147 were received and issued on June 5, 1985. No. 148 was prepared and issued on June 6, 1985. No. 150 was prepared and issued on June 10, 1985. No. 151 was prepared and issued on July 24, 1985. Thus, correction No. 149, dated May 17, 1985 would have been assigned a number entirely out of sequence. No explanation for this occurrence was offered.

(b) Alternatively, it may be argued that the correction was received on May 17, 1985 but not processed. However, the Court is convinced by the testimony of Eugene Picciano, from SEL Maduro, that a correction to the manifest is either processed immediately or put aside without assigning a number to it, but in such a case it would not remain pending for a long period of time. When a correction affects the freight rate, Mr. Picciano further testified that the change would not be automatically accepted. Instead, Bottacchi would have been consulted by Tony Blanco, who was the individual then responsible for handling such a change.

(c) Tony Blanco, formerly of SEL Maduro, testified that although manifest change No. 149 indicated a change in the declared value, he would not have paid much attention to it because such a change in the declared value

29. In 1985, the custom and practice at the Port of Miami concerning the carriage of containers included under-deck as well as on-deck storage.[9]

30. On June 7, 1985, the Ocean Lynx lost five containers over the side of the vessel. Among those lost was No. ADCU 202107-6 which

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would not have been handled in this manner.

(d) The fact that Correction No. 149 was typed, when according to Mr. Blando's testimony, corrections of manifest have always been handwritten.

These facts, taken together, indicate to this Court that the correction to manifest was prepared after the loss had occurred.

[9] Testimony of Eugene Picciano, SEL Maduro. If not the last, Miami is one of the last ports for a vessel voyaging to South America. At any one of the prior ports, containers are first loaded into the under-deck of the vessel. In most cases, by the time a ship reaches Miami, the under-deck compartment for containers has become full. On-deck storage is then used because the ship will not re-position containers.

contained the 56 cartons and 3 crates of machinery and tools shipped by Edusystems.[10]

31. The CIF value of the goods represented by MAR bill of lading No. AS-01 which were lost over the side of the vessel was $134,618.77. Their insured value was $159,220.00.

32. The CIF value for the portion of goods represented by MAR bill of lading AS-02 which were lost over the side of the vessel was $38,865.64. The insured value of these goods was $42,752.20.

33. Edusystems suffered a CIF loss of $173,484.41. It filed a claim upon its

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[10] INA indicates that a total of 63 cartons were lost overboard. This figure represents the 56 cartons plus an apparent 7 cartons contained in the 3 crates. Because the number of packages contained in each crate was never broken down nor otherwise disclosed to MAR or Bottacchi, the Court finds the total number of packages lost at sea to be fifty-nine (59).

insurance company, Insurance Company of North America, and was paid a total $201,972.20, representing the insured value of the goods.

34. MAR Shipping has on file an approved tariff with the Federal Maritime Commission, including a true and correct copy of the front and back of the MAR bill of lading. The tariff contains a clause in Rule 12, concerning ad valorem declarations.

II. CONCLUSIONS OF LAW

1. By reason of the payment to Edusystems, Plaintiff became subrogated to the rights of its named insured and thus a proper party to bring this action.

2. The court has jurisdiction over the subject matter of this controversy pursuant to Admiralty and Maritime jurisdiction, 28 U.S.C. Section 1333. The Court has proper jurisdiction over the plaintiff and defendants MAR and BOTTACCHI. Because the Court does not

have jurisdiction over the M/V Ocean Lynx, the vessel has been dismissed from this controversy.[11]

3. MAR Shipping is an NVOCC. An NVOCC is a common carrier with respect to the shippers using its services. Insurance Co. of N. America v. S/S American Argosy, 732 F.2d 299 (2d Cir. 1984). With respect to the vessel, however, an NVOCC is an agent of the shipper and customer of the ship. Id.

4. Edusystems was the shipper of the cargo that was in container ADCU 202107-6. Thus, with respect to this shipment MAR was an agent acting on behalf of Edusystems. Correspondingly, in MAR's transactions with BOTTACCHI, its role was that of a customer to the ship.

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[11] The Court has also dismissed Nabadi Maritime, S.A. for lack of jurisdiction.

5. The Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. Section 1301 et seq., applies to bills of lading and contracts for carriage of goods by sea to or from ports of the United States with certain exceptions.

6. There were two contracts of carriage issued for the shipment of the cargo. Between Edusystems and MAR, the two MAR bills of lading created the initial carriage agreement, i.e., shipper to NVOCC. The bill of lading issued by BOTTACCHI to MAR constituted the second contract for carriage of the Edusystems cargo, i.e., NVOCC to vessel. The first bill of lading was not merely a formality because MAR Shipping was not authorized to issue bills of lading on behalf of BOTTACCHI.[12]

7. The term "goods" as used in COGSA

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[12] Testimony of Captain Jorge Ves Losada, from Bottacchi.

does not include cargo which under the contract of carriage is stated as being carried on deck and is so carried. 46 U.S.C. Sec. 1301(c).

8. COGSA applies to the contract of carriage in this case because the container was shipped in foreign trade (i.e., transportation of goods between the United States and a foreign port) under a bill of lading. See 46 U.S.C Secs. 1300, 1312. In addition, Clause 1 of the MAR and BOTTACCHI bills of lading expressly incorporated COGSA.

9. Because COGSA applies, it will govern and overrule any clause in the bill of lading in conflict with the statute. Brown & Root, Inc. v. M/V Peisander, 648 F.2d 415 (5th Cir. June, 1981).

10. To establish a prima facie case of liability against a carrier under COGSA, cargo interests must show that the cargo was

received in good condition by the carrier and that the cargo was delivered damaged. Terman Foods, Inc. v. Omega Lines, 707 F.2d 1225 (11th Cir. 1983). INA has established a prima facie case of liability against MAR. MAR's relationship to Edusystems places it in constructive possession of the goods. There has been no suggestion that the cargo was anything but in good condition, and of course, its loss overboard constitutes the damage.

11. Without an express agreement regarding below deck storage, the issuance of a clean bill of lading by the carrier indicates that the cargo is considered contracted to be carried below deck. Calmaquip Eng. West Hemisphere Corp. v. West Coast Carriers, 650 F.2d 633, 638-39 (5th Cir. Unit A July 1981).[13]

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[13] Decisions of the Former Fifth Circuit filed prior to October 1, 1981 constitute binding precedent in the Eleventh Circuit.

12. A shipper and an ocean carrier may contractually agree to extend the application of COGSA beyond its normal parameters. When COGSA is incorporated by reference, it becomes a contractual term of the bill of lading. Colgate Palmolive Company v. S.S. Dart Canada, 724 F.2d 313 (S.D.N.Y.), Cert. denied, 104 S.Ct. 2181 (1983).

13. Clause 7 of the BOTTACCHI bill of lading created an express agreement for the on-deck storage of goods.

14. Even in the absence of an express agreement, the custom and practice at the Port of Miami concerning under-deck as well as on-deck carriage of containers provides a basis from which to impute the consent of MAR Shipping as to the on-deck storage of

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Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

container No. ADCU 202107-6. English Electric Valve Co., Ltd. v. M/V Hoegh Mallard, 637 F.Supp. 448 (S.D.N.Y. 1986). Accordingly, the on-deck storage of container No. ADCU 202107-6 was not an unreasonable deviation from the contract of carriage constituting a fundamental breach of that contract. American Cyanamid Co. v. Booth S.S. Co., Ltd., 99 F.Supp. 232 (S.D.N.Y. 1951), Aff'd, 195 F.2d 529 (2d Cir. 1952).

15. Even in the absence of an express agreement, the practice of MAR with respect to the handling of prior shipments from Edusystems was to not request under-deck storage.[14] Thus, MAR Shipping expected, and can be reasonably charged with the knowledge of the on-deck storage of containers.

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[14] Testimony of Roberto Garofalo, president of MAR Shipping.

Accordingly, the on-deck storage container No. ADCU 202107-6 was not an unreasonable deviation from the contract of carriage constituting of a fundamental breach of that contract.

16. Package Limitation.[15] Finding no unreasonable deviation from the contract of carriage, the Court must now address the application vel non of the $500 package limitation.

The limitation of liability arises under COGSA Section 4(5), 46 U.S.C. 1304(5).[16]

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[15] The effect of MAR's tariff is treated separately. See Infra, paragraph 21.

[16] The relevant section of 46 U.S.C. 1304(5) provides:

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in

Generally, it is the ocean carrier who bears the burden of providing the shipper with a fair opportunity to avoid the COGSA package limitation by declaring the value of the goods and paying the additional freight. Komatsu, Ltd. v. States Steamship Company, 674 F.2d 806 (9th Cir. 1982).

17. In this circuit, however, the shipper caries the burden of proving that an opportunity for a choice of valuation and rates did not in fact exist. Brown & Root, Inc. v. M/V Peisander, 648 F.2d 415 (5th Cir. June 1981); cf. Korematsu, 674 F.2d 806.

> the case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of the goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading shall be prima facie evidence, but shall not be conclusive on the carrier.

18. Clause 16 of the MAR and BOTTACCHI bills of lading contains a recitation limiting liability similar to that of COGSA Section 4(5). INA contends, however, that the differences between Clause 16 and COGSA Section 4(5) create ambiguities leaving a shipper in doubt as to the package limitation. There is no merit to this argument. The application of COGSA necessarily incorporates Section 4(5), 46 U.S.C. Sec. 1304(5), and COGSA overrules any conflict between it and the bill of lading. Brown & Root, supra.

19. INA failed to demonstrate a lack of opportunity to declare value. As a matter of law, the incorporation of COGSA in Clause 1 of the MAR bill of lading provides a fair opportunity. The bill of lading utilized by MAR Shipping provided Edusystems with a fair opportunity to declare valuation. In addition, the reverse side of the MAR bill of

lading is identical to that of the BOTTACCHI bill of lading. MAR was fully aware of this fact, yet never declared valuation to BOTTACCHI when acting in its role as agent for Edusystems.[17]

20. Despite the opportunity to declare a value on the goods, neither Edusystems nor MAR did so. Because this Court finds that Correction to Manifest No. 149 was prepared after the loss, see supra paragraph 28, the attempt to declare valuation was ineffective as a matter of law.[18]

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[17] Mr. Garafalo testified that it was MAR Shipping's responsibility, and not that of Edusystems, to request a value declaration.

[18] Interestingly, on cross-examination in her deposition testimony Judy Turner, the contract manager for Edusystems, stated that since the loss in this case no value declarations have been made on subsequent shipments. Plaintiff's Exhibit 36 at pp. 51, 52. The reason for doing so seems to be that because Edusystems obtains cargo insurance the package limitation are no little consequence.

21. The Effect of MAR's Tariff. MAR has a valid tariff filed with the Federal Maritime Commission.[19] As it applies in this case, the tariff becomes the law establishing the applicable standard for a declaration of

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Thus, the economics of cargo insurance are such that the added freight costs incurred from a value declaration would be unnecessary. Id. at p. 58. To this Court, Edusystems conduct with regard to its goods manifest an intent to not declare a higher value on the equipment it ships.

[19] Testimony of Mr. Mike Telleo, Federal Maritime Commission (Miami). For reasons still unclear to this Court, Mr. Telleo and MAR Shipping stressed to the Court that Mr. Telleo was not testifying as a representative of the Commission. Rather, his testimony was based solely upon his own personal experience. Under the circumstances, however, it seems impossible to distinguish between the two. Mr. Telleo clearly acquired his experience with regard to the MAR tariff only because of his position with the Federal Maritime Commission. This fact, and INA's failure to object to the validity of the tariff, lead to the conclusion that the tariff has been properly established with the Commission.

value. Brown & Root at 421. In MAR's tariff, Rule 8 and 12 provide the manner and additional freight rates with which a shipper must comply in order to increase the carrier's liability beyond the $500 package limitation. More significantly than the bill of lading, the tariff provides a fair opportunity to declare a higher value. Edusystems did not make a declaration and no additional rates were charge or paid. Thus, the $500 package limitation remained in full force and effect.

III. CONCLUSION

In accordance with the Findings of Fact and Conclusions of Law, it is hereby

ORDERED AND ADJUDGED:

(1) That judgment be entered in favor of Insurance Company of North America, Edusystems' subrogated insurer, against MAR Shipping Line, Inc.

(2) That MAR Shipping Line, Inc. is

entitled to limit its liability to INA, pursuant to MAR's bill of lading and tariff, to $29,500, representing the loss of 59 packages at $500 each.

(3) That judgment be entered in favor MAR Shipping Line, Inc. against A. BOTTACCHI S.A. De NAVEGACION.

(4) That A. BOTTACCHI S.S. DE NAVEGACION is entitled to limit its liability to MAR Shipping Line, Inc., pursuant to BOTTACCHI's bill of lading, to $29,500 representing the loss of 59 packages at $500 each.

IT IS FURTHER ORDERED AND ADJUDGED that the parties submit memoranda of law on the issues of costs and attorney fees within ten (10) days from the date of these Findings of Fact and Conclusions of Law.

DONE AND ORDERED at Miami, Florida, this 29th day of December, 1987.

UNITED STATES DISTRICT JUDGE
ALCEE L. HASTINGS

Copies to:

Mary Lou Rodon-Alvarez, Esquire
Allan R. Kelley, Esquire
G. J. Rod Sullivan, Jr., Esquire